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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS WARD,

Defendant and Appellant.

C060306

(Super. Ct. No.
07F10765)

As Hilary Holt loaded bags into her Pontiac Firebird outside a Days Inn motel, a man and a woman walked up to her. The man held a black handgun and demanded Holt's car keys. Holt grabbed at the gun and the duo struggled. After Holt's screams attracted bystanders, the man and woman jumped a fence and fled the scene. An information charged defendant Thomas Ward with attempted carjacking, assault with a firearm, carrying a concealed firearm without being the registered owner, and carrying a loaded firearm in public while in a prohibited area

of an unincorporated territory without being the registered owner. (Pen. Code, §§ 664/215, subd. (a), 245, subd. (a)(2), 12025, subd. (b)(6), 12031, subd. (a)(2)(F) & 11106.)¹

A jury found defendant guilty on all counts, and the court sentenced him to 13 years 10 months in state prison. Defendant appeals, contending insufficient evidence supports the personal use of a firearm allegation, the carrying a concealed firearm while not a registered owner allegation, the carrying a loaded firearm in a prohibited area of unincorporated territory allegation, and sentencing error. We reverse defendant's conviction under section 12031, subdivision (a)(2)(F). In addition, we shall direct the court to stay sentence on the assault conviction and the accompanying section 12022.5 enhancement. In all other respects we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Officers responding to the carjacking arrested codefendant Dominique Pruitt at a light rail station near the Days Inn. Pruitt's backpack yielded defendant's ATM card and other documents belonging to defendant. An amended information charged defendant and Pruitt with attempted carjacking, carrying a concealed firearm without being the registered owner, and carrying a loaded firearm in public while in a prohibited area of an unincorporated territory without being the registered

¹ All further statutory references are to the Penal Code.

owner, and charged defendant with assault with a firearm. As to the carjacking and assault charges, the information alleged defendant personally used a firearm in the commission of each offense. (§§ 12022.53, subd. (b), 12022.5, subd. (a).)²

A jury trial followed.

The Attempted Carjacking

What the Alms Saw

On a morning in November 2007 Sharon Alm waited for her husband Richard in their car parked outside the Days Inn. Sharon noticed a black man and a black woman acting suspiciously. She got a good look at the man, whom she later identified as defendant, and his companion when they walked past her car. The woman walked up to the second floor of the motel. Defendant remained behind and Sharon saw him pick up a large rock.

Defendant held the rock until the woman returned. The pair began to walk back toward Sharon's car. They stopped and the woman spoke to defendant, who looked in the direction of the motel office, turned around, and sat down.

Richard returned from the motel office and Sharon told him what she had seen. Richard took a photograph of the man and woman with his digital camera. At trial, Sharon identified the

² Pruitt pled no contest to attempted carjacking, carrying a concealed firearm without being the registered owner, and carrying a loaded firearm in public while in a prohibited area of an unincorporated territory without being the registered owner.

photograph of defendant that Richard took that morning at the motel.

Richard drove up to the motel office to tell the desk clerk about the pair. The Alms subsequently saw the man and woman going over a fence at one end of the motel parking lot. Neither Richard nor Sharon observed the carjacking or saw a gun.

Hilary Holt's Testimony

That morning, Hilary Holt checked out of her room at the Days Inn. She brought her belongings down to the parking lot, where her mother's 1999 Pontiac Firebird was parked.³ As Holt walked down the stairs from her room, she noticed a black male and a black female. The woman wore a blue-green jacket with fur around the hood. The man, who was tall and thin, wore a black hooded sweatshirt. After Holt finished loading the car's trunk, she opened the driver's side door.

As she began to sit in the driver's seat, Holt heard a voice behind her say, "[G]ive me your keys." Holt turned and saw the same man and woman she had seen as she walked down the motel stairs. The man held a small black revolver, pointed at Holt's stomach. He told Holt, "[D]on't make me shoot you, just give me your keys."

Holt grabbed the gun with her left hand while holding her keys in her right. Holt and the man struggled over the gun, and

³ At the time of trial, Holt had pled no contest to and was in custody for driving a stolen vehicle and felony evading a police officer.

Holt fell to the ground. After Holt fell, the man got into the driver's seat and yelled for his companion to get the keys. Holt fought back and held on to the keys, screaming for help.

After a few minutes, some motel workers ran to Holt's car. Holt managed to get up, and when the woman made one last attempt to get the keys, Holt hit her in the head. The pair then fled, hopping over a fence and running toward the nearby light rail station.

What Days Inn Employees Saw

Maria Palacios, cleaning a room upstairs in the motel, heard someone screaming for help. She stepped outside to see what was happening and saw a black man trying to grab a white woman by the mouth down in the parking lot. According to Palacios, the man had little braids in his hair and wore a black sweatshirt. He and a black woman were hitting the white woman.

Palacios attempted unsuccessfully to summon help by using a phone in the room. When she went back outside she saw the white woman on the ground with the man's foot on her neck. The man was trying to take something from her hand and the black woman was hitting the victim in the face. The victim continued to scream and some maintenance workers intervened. The workers tried to pull the victim away as the black woman hit the victim again.

A Days Inn supervisor, David Trujillo, also saw the attempted carjacking. Trujillo described the black male as being 5 feet 10 or 11 inches tall, weighing about 170 pounds,

and wearing shoes with red on them. He heard the victim yelling, "[H]e's got a gun, he's got a gun." Trujillo saw the man with his hand in his waistband; he did not see a gun. At trial, Trujillo could not identify defendant as the man he saw that day.

Darius Trujillo, cleaning the pool at the motel, also witnessed the attack. He saw the man run but did not get a good look at him, nor did he see a gun.

At the Light Rail Station

The morning of the crime, 14-year-old R.J. was standing on the lower level of the light rail station near the Days Inn.⁴ R.J. wore black sweats, with a hood covering his head, and black and white shoes with "Spike Lee" written on the back.

R.J. saw defendant asking passersby for a T-shirt. Defendant asked R.J. for his T-shirt, but R.J. refused. Defendant was dressed in black sweats and a gray tank top, and he carried a black sweater embellished with a skull. He wore multicolored "Slicks" shoes with alligators on the side.

Defendant got a white T-shirt from another man in exchange for a bus pass. R.J. saw defendant sitting near codefendant Pruitt. Pruitt had a backpack and a purse with her. As the police drove up, defendant told Pruitt to "stay here," and he went upstairs wearing the white T-shirt. R.J. identified

⁴ R.J. was on juvenile probation and had been previously arrested for vandalism and felony assault.

People's exhibit No. 2 as the jacket defendant wore and had given to Pruitt.

R.J. testified that the officers walked up and arrested him, and questioned him about the carjacking. He testified he had nothing to do with the carjacking.

At the station, Holt identified Pruitt as the woman involved in the attempted carjacking. Officers showed R.J. to her and asked if he was the male perpetrator. At first, Holt was not sure because the man had been wearing a hood. After R.J. put his hood up, Holt identified him as her assailant. Holt told Deputy Ricardo Cano that she did not recognize R.J.'s face.⁵

At the crime scene, Holt had described her assailant as being over six feet tall with a thin build. The man's sweatshirt had a zipper and a picture of something red on it. At trial, Holt identified People's exhibit No. 2 as the sweatshirt worn by her assailant.

Deputy Jon Zwolinski responded to the light rail station and spoke with security guard Crystal Lang. Lang told him she had seen a black female dressed in a blue coat with a fur-lined hood run from the Days Inn across several lanes of highway traffic into the station. Lang stated the woman had removed her jacket and now wore a pink top. She had last seen the woman

⁵ Later, while still at the station, Holt viewed a computer-generated lineup that included defendant's photo. Holt did not identify any of the photos as being of her assailant.

sitting on the stairs that lead to the upper level of the station. Lang did not see the male suspect.

Zwolinski, accompanied by Deputy Matthew Warren and Deputy Finch, walked to the area Lang described. They saw a woman in a pink top talking to R.J., who appeared to be in his early twenties. R.J., dressed in black, sat a few feet away from the woman.

Zwolinski saw the woman's jacket, as described by Lang, lying next to the woman along with a purse and backpack. The officers detained the woman, later identified as Pruitt, and R.J.

As Zwolinski picked up the purse, he felt a heavy object at the bottom. He opened the purse and discovered a loaded .22-caliber handgun inside. Zwolinski also found an identification card and bank card in Pruitt's name.

In the backpack, the deputy found a black hoodie sweatshirt, a wallet with an ATM card bearing defendant's name, defendant's checkbook, and a Department of Motor Vehicles receipt issued to defendant. He also discovered a request for a change to defendant's driver's license in the name of Hafasa Manga. Other documents included a contempt proceeding from the superior court involving defendant and a pay request for an account issued to defendant. Among various items of clothing in the backpack, the officer discovered a black knit skull cap and leather gloves.

Deputy Warren handcuffed R.J. and placed him in his patrol car. Because defendant's name appeared on several items found

in the backpack, Warren ran a search for defendant on the computer in his vehicle. When a photo of defendant appeared on the computer screen, R.J., from the back seat, excitedly exclaimed, "[T]hat's the guy I saw with the chick. That's him. I told you, it wasn't me."

Subsequent Identifications

Shortly afterward, both Sharon and Richard Alm identified Pruitt as the woman they had seen earlier. Neither of them identified R.J. as the male. The Alms stated R.J. was not wearing the same jacket and ski cap that the man they had seen wore. R.J. also wore different shoes. Sharon picked defendant's photo out of a computer-generated lineup. At trial, both Sharon and Richard identified defendant as the man at the motel with Pruitt.

A few weeks after the incident, Palacios selected defendant's photo in a photographic lineup. David Trujillo picked two pictures out of a lineup, one of which was of defendant. However, at trial Trujillo could not identify defendant.

Defendant's Statement to Police

Detective Dennis Ward interviewed defendant the following month. The interview recording was played for the jury.

Ward read defendant his *Miranda* rights, and defendant agreed to speak with the detective.⁶ Ward showed defendant the

⁶ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

photo taken by Richard Alm at the motel. Defendant said he and his friends all looked alike, they all wore dreadlocks and wore the same kind of shoes. Defendant denied attempting to carjack Holt's vehicle.

The detective told defendant the gun they found had a dented primer, which meant the trigger was pulled but the gun did not go off. Ward asked if defendant tried to fire the gun during the incident, or if the gun was already in that condition. Defendant said he did not load the gun, nor would he try to shoot anyone in broad daylight. He also said his fingerprints would not be on the gun.

Defendant admitted knowing Pruitt and claimed the gun belonged to her. He said Pruitt was lying when she told officers defendant "set this up."

According to defendant, Pruitt called him and asked for a ride back to Merced. When he arrived, defendant discovered Pruitt had a gun. Defendant told Pruitt she should not be carrying a gun and that she should take the bus home. Pruitt responded: "Man, fuck this shit. I'm about to get that bitch right there." Defendant told her not to, but "at the same time . . . the gun was in my hand." Pruitt told defendant the gun did not work.⁷

⁷ It was stipulated that no usable fingerprints were found on the gun, and that the gun was not registered to defendant or anyone else.

Defense Case

Deputy Brian Templeton testified that he investigated the incident and returned the car keys to Holt. Templeton did not know if anyone verified who actually owned the car.

The defense also stressed that R.J.'s photo was not included in any of the photo lineups. Detective Ward stated he did not include R.J.'s photograph because R.J. did not match the description witnesses gave of the suspect. The witnesses described a male between 20 and 25 years of age; R.J. was 14 years old.

Verdict and Sentencing

The jury found defendant guilty of all counts and found the firearm allegations to be true. The court sentenced defendant to 13 years 10 months: one year six months for attempted carjacking, plus 10 years for personally using a firearm pursuant to section 12022.53, subdivision (b), and a consecutive one year for assault with a firearm, plus one year four months for personally using a firearm pursuant to section 12022.5, subdivision (a). The court stayed sentence on the remaining counts pursuant to section 654. Defendant filed a timely notice of appeal.

DISCUSSION

PERSONAL USE OF A FIREARM

Defendant contends insufficient evidence supports his conviction for personal use of a firearm in the commission of a felony. (§§ 12022.53, subd. (b), 12022.5, subd. (a).) According to defendant, his statements, Holt's testimony, and

the failure of the other witnesses to testify they saw a gun are insufficient to prove the requisite personal use; defendant's statements establish only that at some unknown point the gun was in his hand. The evidence does not establish that he displayed the firearm in a menacing manner.

Sections 12022.53, subdivision (b) and 12022.5, subdivision (a) require that the defendant personally use a firearm in the commission of a felony. As the court instructed the jury, personal use means the defendant (1) displayed the firearm in a menacing manner, (2) hit someone with the firearm, or (3) fired the firearm. It is not necessary that the firearm be operable at the time it is used, but there must be sufficient evidence that the firearm appeared to be capable of firing. (*People v. Hayden* (1973) 30 Cal.App.3d 446, 452, overruled on other grounds in *People v. Rist* (1976) 16 Cal.3d 211, 221.)

Whether a defendant personally used a firearm presents a factual question for the jury to decide. (*People v. Jacobs* (1987) 193 Cal.App.3d 375, 380.) We review the entire record in the light most favorable to the judgment to determine whether a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Staten* (2000) 24 Cal.4th 434, 460; *Jacobs, supra*, 193 Cal.App.3d at p. 380.)

Defendant separately analyzes his statements to police, Holt's testimony, and the testimony of various witnesses to

challenge the sufficiency of the evidence that he used a gun in the commission of the robbery. We are not persuaded.

In his interview with Detective Ward, defendant stated that he told Pruitt, "No. But at the same time . . . the gun was in my hand." Defendant, makes the dubious claim that "[m]ere proof that at some point a gun was in [his] hand is insufficient to prove the requisite firearm personal use" Regardless, the aggregated evidence of personal use is overwhelming.

Defendant asserts Holt's failure to identify him as her assailant, and her subsequent identification of R.J. as her attacker, renders her testimony regarding the carjacker's brandishing of a gun insufficient. Holt testified the male carjacker pointed a black revolver at her during the incident. Holt later identified the gun found in Pruitt's purse as the gun her assailant wielded. Holt identified Pruitt as the female assailant. Although Holt could not identify defendant as the perpetrator, she also stated that during the incident her focus was on the gun, not on the face of her attacker. Again, defendant considers Holt's testimony in isolation, ignoring it in the context of his own statements and the testimony of other witnesses.

Finally, defendant argues none of the other witnesses saw him with a gun. Therefore, defendant reasons, their testimony is insufficient to support his conviction.

However, when taken together, defendant's statements, Holt's testimony, and the testimony of other witnesses provides sufficient evidence that defendant personally displayed the

weapon in a menacing manner. Although Holt did not identify defendant as her assailant, she did identify the gun involved as having been in the hand of her male assailant, who said at the time, "don't make me shoot you," and identified Pruitt as the woman. In short, Holt testified the man pointed the gun at her and demanded the keys. Eyewitness David Trujillo heard Holt yell, "[H]e's got a gun, he's got a gun."

Prior to the incident, Sharon Alm saw defendant and Pruitt acting oddly in the motel parking lot. Richard Alm photographed them. Sharon Alm saw defendant and Pruitt climb over the motel fence.

Light rail security guard Lang saw Pruitt run from the motel across several lanes of highway traffic and enter the station. At the station, R.J. saw defendant asking patrons for a T-shirt. After defendant donned a white T-shirt, he told Pruitt to remain where she was while he fled the station.

Pruitt's purse yielded the gun later identified by Holt. The backpack near Pruitt yielded several documents with defendant's name on them and the black sweatshirt worn by Holt's assailant. Defendant told Detective Ward that Pruitt had given him a gun, and that he had been holding the gun.

Instead of segmenting the testimony of various witnesses, as defendant suggests, we view all the evidence in the light most favorable to the judgment. Accordingly, all of this evidence, taken together, supports defendant's conviction for personally using a firearm during the attempted carjacking.

CARRYING A CONCEALED FIREARM

Defendant also challenges the sufficiency of the evidence in support of his conviction for carrying a concealed firearm on his person. (§ 12025, subd. (b)(6).) According to defendant, the evidence failed to show he concealed the weapon or that the weapon was carried while concealed on his person. Defendant also argues the trial court erred in denying his motion for acquittal in connection with the count. (§ 1118.1.)

A person is guilty of carrying a concealed firearm when he or she carries concealed upon his or her person any firearm capable of being concealed upon the person. The defendant must carry a firearm substantially concealed upon his or her person and know he is carrying the firearm. (§ 12025, subd. (a)(2).) Section 12025 does not require total concealment. (*People v. Hale* (1974) 43 Cal.App.3d 353, 356.)

Defendant contends, and the People concede, that carrying a concealed firearm in violation of section 12025 cannot be constructive. Therefore, defendant contends, the discovery of the gun in Pruitt's purse, when defendant was not present, cannot support his conviction for carrying a concealed firearm.

Again, defendant considers this evidence in isolation. Holt testified her assailant held the gun close to his pocket. David Trujillo did not see a gun but heard Holt yelling, "[H]e's got a gun." Trujillo saw the assailant with his hand in his waistband. Defendant admitted he took the gun from Pruitt and had it in his hand. However, Palacios, David Trujillo, and Darius Trujillo did not see defendant with a gun. The complete

sequence of events, not just the discovery of the gun in Pruitt's purse, provides sufficient evidence that defendant concealed the gun on his person.

Defendant argues his section 1118.1 motion should have been granted, since at the time of the motion, the evidence was legally insufficient to prove the firearm was not registered to him. We disagree.

After the defense rested its case-in-chief, counsel moved for a judgment of acquittal. The court noted it possessed the authority to permit the prosecution to reopen its case. The next day, prior to closing arguments, the parties stipulated "[t]he revolver that was recovered in this case was not registered with the Department of Justice by the defendant as him being the registered owner. And the revolver was not registered to anyone else with the Department of Justice as registered owner."

Defendant argues that since at the time he brought his motion there was no evidence regarding the gun's registration, the court should have granted his motion for acquittal under section 1118.1. Section 1118.1 provides, in part, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal . . . if the evidence then before the court is insufficient to sustain a conviction"

The trial court has broad discretion to order a case reopened to permit the introduction of additional evidence. We may not reverse such a ruling absent an abuse of discretion. (*People v. Goss* (1992) 7 Cal.App.4th 702, 706; *People v. Ayala* (2000) 23 Cal.4th 225, 282.) We find no such abuse of discretion in the present case.

Acting within its discretion, the court permitted the case reopened to admit the stipulation. The stipulation provided sufficient evidence that defendant was not the registered owner of the weapon. In turn, the court properly denied defendant's motion of acquittal.

**CARRYING A LOADED FIREARM IN A PROHIBITED AREA
OF AN UNINCORPORATED TERRITORY**

Defendant contends insufficient evidence supports his conviction for carrying a loaded firearm in a prohibited area of an unincorporated territory while not the registered owner. (§ 12031, subd. (a)(2)(F).) Defendant challenges the assumption that the Days Inn motel was a prohibited area of an unincorporated territory.

Section 12031, subdivision (a)(1) provides: "A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." A prohibited area is "any place where it is unlawful to discharge a weapon." (§ 12031, subd. (f).)

Defendant, relying on our opinion in *People v. Knight* (2004) 121 Cal.App.4th 1568 (*Knight*), argues the evidence was insufficient to sustain his conviction.

At trial, the only evidence in support of the charge of carrying a loaded weapon in an unincorporated territory consisted of Detective Ward's statement that the crime occurred in an unincorporated area. However, section 12031 requires evidence the defendant carried a loaded firearm "in any public place or on any public street in a *prohibited area* of unincorporated territory." (*Italics added.*)

In *Knight, supra*, 121 Cal.App.4th 1568, we held the prosecution failed to meet its burden of showing officers had proper justification for stopping and searching the defendant, and reversed the trial court's denial of the defendant's motion to suppress. We rejected the trial court's interpretation that section 12031 could be violated by a defendant carrying a loaded weapon in any public place. (*Knight*, at p. 1575.) Applying the principles of statutory construction, we determined section 12031, subdivision (a)(1) "prohibits carrying a loaded firearm on one's person or in a vehicle: (1) while in any public place in an incorporated city; (2) while on any public street in an incorporated city; (3) while in any public place in a prohibited area of unincorporated territory; or (4) while on any public street in a prohibited area of unincorporated territory." (*Knight*, at p. 1576.)

In *Knight*, the prosecution presented no evidence that the place or street where the defendant possessed the loaded firearm

was in an incorporated city or a prohibited area of an unincorporated territory as required by section 12031. The arresting officer testified he did not know whether there were any county ordinances that prohibited the discharge of a firearm in the area where the defendant was detained, searched, and arrested. (*Knight, supra*, 121 Cal.App.4th at p. 1574.) Instead, the prosecution argued section 12031 prohibited carrying a loaded weapon in any public place, an argument we soundly rejected. (*Knight*, at pp. 1574-1576.)

Here, the People argue the prosecution presented evidence that defendant possessed a revolver in an unincorporated area of Sacramento County. The Attorney General contends, "Without [a] doubt the Days Inn parking lot was a public place and discharging a weapon there would be unlawful under section 246.3 [willful discharge of a firearm in a grossly negligent manner]. Because discharging a weapon in a parking lot accessible to and used by the public would be unlawful under California law, the prosecution satisfied the element of section 12031 . . . requiring that the crime take place in a prohibited area of the unincorporated territory."

We are not persuaded by the People's attempt to utilize the elements of a section 246.3 violation to establish that defendant's actions took place in a prohibited area. Here, we are not concerned with the willful discharge of a firearm in a grossly negligent manner, but with carrying a loaded firearm in a prohibited area of an unincorporated territory. Since the prosecution failed to meet its burden of proving the elements of

the offense, defendant's conviction under section 12031 must be reversed.

SENTENCING ERROR

Finally, defendant asserts his sentences for attempted carjacking and assault with a firearm violate section 654 because the assault was perpetrated to accomplish the attempted carjacking. Therefore, the assault with a firearm conviction and attached section 12022.5 enhancement must be stayed. The People concede the error.

Section 654 precludes multiple punishments for a single act and for an indivisible course of conduct comprising more than one act. If all of the offenses were incident to one objective, the defendant may be punished for any one of the offenses, but not for more than one. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952; *People v. Deloza* (1998) 18 Cal.4th 585, 591.)

We agree with the parties' interpretation of the evidence. Defendant pointed the gun at Holt to get her car keys. His act of attempting to steal Holt's keys by threatening her with a gun and the attempted carjacking comprise an indivisible course of conduct with a single objective—stealing the Pontiac Firebird. Accordingly, we direct the court to stay defendant's sentence on count two and the accompanying section 12022.5 enhancement.⁸

⁸ The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was convicted of a serious felony. (§ 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

We reverse defendant's conviction for carrying a concealed firearm in an unincorporated territory while not the registered owner. (§ 12031, subd. (a)(2)(F).) The sentence on the remaining counts is vacated and the case is remanded for resentencing consistent with the views expressed herein. The judgment is otherwise affirmed. The trial court is directed to prepare an amended abstract of judgment recording the modification of judgment and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.